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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CLAIRDEAN V. MOORE, Plaintiff and Respondent, v. FRITZ KOENIG, Defendant and Appellant.	E047951 (Super.Ct.No. CIVMS800890) **OPINION**

APPEAL from the Superior Court of San Bernardino County. Bert L. Swift, Judge. Reversed.

Bruce W. Nickerson for Defendant and Appellant.

Mark S. Mahoney for Plaintiff and Respondent.

The trial court granted a permanent injunction prohibiting defendant Fritz Koenig from harassing plaintiff Clairdean V. Moore. Koenig appeals, arguing:

1. The trial court violated due process by terminating the hearing before Koenig could present all of his evidence.

2. The harassment injunction procedure was improperly used to resolve a complex real property dispute.

3. To the extent that Koenig's allegedly harassing conduct consisted of taking photographs, it was constitutionally protected under the First Amendment.

We agree that the trial court erred by letting Moore present all of his evidence, while barring Koenig from presenting all of his. This error is reversible per se. We need not address Koenig's other contentions; he remains free to raise them in the trial court on remand.

I

PROCEDURAL BACKGROUND

In October 2008, Moore filed a petition for a harassment injunction (Code Civ. Proc., § 527.6) against Koenig. The petition named Edward J. Tucker as an additional person to be protected. It alleged that Koenig had threatened to close Hoot Owl Trail, which provided the only access to Moore and Tucker's home. It further alleged that Koenig "videos us and our guests, prevents any maintenance of our road, sends letters, and left [a] threatening message on [our] answer[ing] machine."

Koenig filed a response to the petition in which he alleged, among other things, that he had been acting on the advice of his former attorney and that he had been trying to document Moore's abuse of his property rights.

In December 2008, the trial court held an evidentiary hearing on the petition. At the end of the hearing, it issued an injunction providing that Koenig must not harass or

contact Moore or Tucker; must stay at least 100 yards away from them, their home, and their vehicle; must not photograph or videotape them; and must not interfere with access to their property or to Hoot Owl Trail.

II

THE PREMATURE TERMINATION OF THE TRIAL

Koenig contends that he was prevented from having a full trial, in violation of due process.

A. *Additional Factual and Procedural Background.*

Apparently the trial was set for a date that was "approximately a day or two" before the trial judge was set to retire. However, the record does not show that the parties were made aware of that before trial.

The trial began sometime between 1:30 and 2:30 p.m. The first witness that Moore's counsel called was Moore himself. After Moore's counsel's direct examination, and during Koenig's counsel's cross-examination, the trial court took a 15-minute recess to deal with another case.

Later, after Koenig's counsel's cross-examination of Moore resumed, the trial court broke in and stated: "This is not a three-day trial. You've got until 4:30 to get this case done. So I don't know where you're going to go from here." Koenig's counsel responded, "I'm almost done with Mr. Moore." The trial court declared, "At 4:30 I mistry this. Then I'll give you a full day if you need one. But I'm going to have to mistry it if that's the case." Koenig's counsel immediately terminated his cross-examination.

The second witness Moore's counsel called was David Falossi. During Falossi's cross-examination, the trial court warned, "Gentlemen, you have 40 minutes."

Later in the cross-examination, the trial court interrupted to ask Moore's counsel, "Are you going to use [a certain witness]? Because you don't have time to put on another witness here." Moore's counsel indicated that he would not use that witness, and the trial court excused him.

When Moore's counsel called a third witness, the trial court said, "You sure you want to call another witness? The problem is if they don't have time for cross-examination and [to] put on their case, I'm going to mistry the case. My suggestion to you is you rest at this point subject to rebuttal because you've only got 25 minutes here." Moore's counsel accordingly rested.

Koenig's counsel then called his first witness, namely Koenig. While Koenig's direct examination was still in progress, the trial court announced, "[Y]our time is up." Koenig's counsel asked if he could "at least" have Koenig testify about his photographic activities. The trial court ruled that such evidence was irrelevant. It then excused Koenig. This discussion ensued:

"THE COURT: Permanent restraining orders are granted . . . .

"[KOENIG'S COUNSEL]: Your Honor, before you do that, can I at least put in our argument so that we can raise an issue?

"THE COURT: You can put in your issue but not the argument. You've used enough time. I warned you guys about what your time frames were. And I understand,

[Koenig's counsel], you didn't have an adequate amount of time. Now, you can stipulate that this can be a temporary order and have a full order at a later date with a full hearing. But I'm going to have to make an order today.

"[KOENIG'S COUNSEL]: But by all means, your Honor, I would rather have that full hearing where we can get our full opportunity.

"THE COURT: [Moore's counsel], I'm putting you on the spot here, but as far as —

"[MOORE'S COUNSEL]: I'm going to put the court on the spot, if I may, and I don't mean to be inadvertent [*sic*; *sc*. "impertinent"?]. Is this going to be a trial de novo or will your Honor be back here in a temporary manner?

"THE COURT: No, not likely.

"[KOENIG'S COUNSEL]: We can use a transcript, your Honor, and save a lot of time. We'll pay for the transcript.

"THE COURT: Well, but that means you're going to have more witnesses. . . .

"[KOENIG'S COUNSEL]: I haven't had a chance yet to get [a certain witness] to testify.

"THE COURT: I understand. But that, unfortunately, wasn't the Court's problem at the outset in this case.

"[KOENIG'S COUNSEL]: That would be our wish, your Honor, is to grant the mistrial. If you're going to grant the restraining order, at least give us the mistrial so we can retry this at a full hearing.

"THE COURT: This is going to stop. This photographing has got to stop. There is no justification. [¶] . . . [¶]

"[KOENIG'S COUNSEL]: And not give us that hearing, your Honor?

"THE COURT: And not give you the hearing.

"[KOENIG'S COUNSEL]: Then let me at least make that claim I was going to make.

"THE COURT: I've got two other people waiting for their cases, and I put it over for this particular case to be done.

"[KOENIG'S COUNSEL]: At least give us a chance to raise the issue. You didn't give us a chance to argue, and I wanted to argue the constitutional portion. You have to make that finding[,] too, that this is not conduct that is protected by the Constitution.

"THE COURT: The conduct meets the requirements of 527.6, period.

"[KOENIG'S COUNSEL]: But not if he's exercising a constitutional right, your Honor, which is to photograph on his own property.

"THE COURT: There is no constitutional right — don't argue with me . . . . There is no constitutional right to harass a person through videotaping and keeping a person under surveillance with no legitimate purpose.

"The permanent orders are granted for a period of two years."

B. *Analysis.*

"'[A] trial judge should not determine any issue that is presented for his consideration until he has heard all competent, material, and relevant evidence the parties desire to introduce.' [Citation.]" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357-1358.)

"[A]ll relevant evidence is admissible, except as specifically provided by statute. [Citations.] . . . 'One of the elements of a fair trial is the *right to offer relevant and competent evidence on a material issue*. Subject to such obvious qualifications as the court's power to restrict cumulative and rebuttal evidence . . . , and to exclude unduly prejudicial matter [citation], denial of this fundamental right is almost always considered reversible error. [Citations.]' [Citation.] Ordinarily, parties have the right to testify in their own behalf [citation], and a party's opportunity to call witnesses to testify and to proffer admissible evidence is central to having his or her day in court. [Citations.]" (*Elkins v. Superior Court*, *supra*, 41 Cal.4th at p. 1357.)

"[T]rial courts retain great power to prevent civil trials from taking more time than necessary [citation] . . . ." (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 683.) "'But efficiency is not an end in itself. Delay reduction and calendar management are required for a purpose: to promote the just resolution of cases on their merits. [Citations.] . . . " . . . When the two policies collide head-on, the strong public policy favoring disposition on the merits outweighs the competing policy favoring judicial

efficiency." [Citation.] What is required is balance. . . .' [Citation.]" (*Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389, 1396.)

On this record, the trial court abused its discretion by preventing Koenig from presenting evidence and closing argument (see Code Civ. Proc., §§ 607, 631.7) solely because the hearing had to end by 4:30 p.m. There is no indication that the parties had agreed to this deadline or that they were even made aware of it until the hearing was already underway. Moreover, the trial court told them repeatedly that, if the trial did not end by 4:30 p.m., the result would be a mistrial. Indeed, a mistrial was the appropriate remedy. (See *Blumenthal v. Superior Court, supra*, 137 Cal.App.4th at pp. 680-682.) They were entitled to rely on this advice in deciding how to proceed. The trial court sandbagged Koenig by ruling on the merits instead.

Most egregiously, the trial court allocated its limited time inequitably. Moore got to present his entire case-in-chief.[1] Admittedly, some of that time was taken up by Koenig's counsel's cross-examination of Moore's witnesses, but the cross-examination was not cumulative, unduly long, or outside the scope of the direct. By the time Moore's counsel rested, Koenig had only 25 minutes left to put on his entire case-in-chief. It was simply unfair to let one side finish, but not the other.

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[1] Originally, Moore's counsel planned to call two additional witnesses; as things developed, rather than risk a mistrial, he chose not to do so. While this undoubtedly was not ideal from his perspective, he did so without objection, then voluntarily rested his case. Thus, it appears that he got to present what he considered to be enough evidence, even if it was not all the evidence that he would have liked. The trial court's ruling in Moore's favor shows that this was a good call.

This case is almost on all fours with *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281. There, the trial court repeatedly warned the parties that the case was taking too long and that a mistrial could result. It set a deadline of 4:30 p.m. on the third day of trial. (*Id*. at pp. 286-288.) When that time arrived, even though the husband's case-in-chief was still in progress, it announced, "This trial has ended" and left the bench. (*Id*. at pp. 288-289.) It then ruled against the husband on almost every issue. (*Id*. at p. 290.)

The appellate court held: "[B]y abandoning the trial in the middle of [the husband's] case-in-chief without giving him an opportunity to complete the presentation of evidence or offer rebuttal evidence, the trial court denied him his constitutional right to due process and a fair trial." (*In re Marriage of Carlsson*, *supra*, 163 Cal.App.4th at p. 290.) "Unquestionably, the trial court has the power to rule on the admissibility of evidence, exclude proffered evidence that is deemed to be irrelevant, prejudicial or cumulative and expedite proceedings which, in the court's view, are dragging on too long without significantly aiding the trier of fact. If the court errs in any of these respects, its rulings may be reviewed by a higher court and, if prejudicial, the judgment will be reversed. That kind of review is unavailable here, however, because the court's summary termination of the trial infringed on [the husband]'s fundamental right to a full and fair hearing." (*Id*. at p. 291.) The court also held that the error was reversible per se. (*Ibid*.)

Even when a trial exceeds the parties' own time estimate — and we caution, the record does not show that happened here — the trial court must exercise its discretion

carefully. " . . . Haste makes waste. Obviously trial court administration scheduling requires a reasonable approximation between counsel's estimated time for trial and actual time. But adherence to a rigid get-it-over-within-your-original-time-estimate approach falls into the opposite ditch, and can waste a great deal of court and attorney time in any given case. Moreover, to the degree such a policy is justified by the in terrorem effect on attorneys to stay within original time estimates, it will only encourage longer time estimates as attorneys give themselves a greater margin for error. In addition it will encourage stalling at trial by any party who believes it can obtain an advantage by crowding the time available to its opponent. A trial, unlike grand master chess or the last two minutes of a close football game, should not become a race against the clock." (*Abbott v. Mandiola* (1999) 70 Cal.App.4th 676, 680, fn. 5.)

In sum, the trial court erred by precluding Koenig from putting on his entire case-in-chief and from presenting closing argument. Moreover, the error requires reversal.

Koenig has raised two additional contentions. To the extent that we have discretion to discuss them for the guidance of the trial court on remand (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249), we choose not to exercise that discretion here. Precisely because Koenig was not allowed to put on his entire case, we do not have a full and adequate record. We decline to tie the trial court's hands by declaring the law of the case on this incomplete record. Koenig remains free to raise these contentions in the trial court on remand.

III

DISPOSITION

The order appealed from is reversed. Koenig is awarded costs on appeal against Moore.

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RICHLI
J.

We concur:

McKINSTER
Acting P.J.

MILLER
J.